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No. 93-7927

In The

Supreme Court of the United States

October Term, 1993

CURTIS LEE KYLES,

Petitioner,

versus

JOHN P. WHITLEY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. *Whether production by State of exculpatory materials, proper prosecutorial conduct, and effective performance by Petitioner's trial counsel would have resulted in acquittal or mistrial?*

2. *Whether production by State of exculpatory materials, proper prosecutorial conduct, and effective performance by Petitioner's trial counsel would have produced sufficient residual doubt in the mind of at least one juror to result in a life sentence rather than the death penalty?*

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Wells, *What Do We Know About Eyewitness Identification?*, 48 Amer. Psychologist 553 (1993) 38

5 J. Wigmore, Evidence § 1367 (Chadbourne Rev. 1974) 37

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 5 F.3d 806 (CA5 1993), and is reproduced in the Joint Appendix (JA) at 40. The memorandum opinion of the United States District Court for the Eastern District of Louisiana is reproduced at JA 137.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was rendered on October 14, 1993. A petition for rehearing was denied on November 12, 1993. The petition for writ of certiorari was filed on February 10, 1994 and granted on April 25, 1994. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense;

the Eighth Amendment, which provides in relevant part:

> [N]or [shall] excessive fines [be] imposed, nor cruel and unusual punishments [be] inflicted;

and the Fourteenth Amendment, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

This case also involves the following Louisiana statutes, which are reprinted in Appendix A:

> Louisiana Revised Statute 14:30
>
> Louisiana Code of Criminal Procedure, Article 905.2.

STATEMENT OF THE CASE

i. Course of the Proceedings[1]

Curtis Kyles was tried for first degree murder on Nov. 26, 1984. The jury was unable to reach a verdict, and a mistrial was declared. He was tried again on Dec. 6-8, 1984, convicted of first degree murder and sentenced to death. His conviction and sentence were affirmed on direct appeal. *State v. Kyles*, 513 So.2d 265 (La. 1987), *cert. denied*, 486 U.S. 1027 (1988).

Petitioner sought collateral review in state court. The trial court denied relief. The Louisiana Supreme Court remanded the case for an evidentiary hearing. *State ex rel. Kyles v. Whitley*, 535 So.2d 750 (La. 1989). The trial court issued a judgment against petitioner after the hearing. JA 31. The supreme court denied discretionary review by a vote of 5 to 2. *State ex rel. Kyles v. Whitley*, 566 So.2d 386 (La. 1990).

Petitioner then filed a petition for habeas corpus in the United States District Court for the Eastern District of Louisiana on Oct. 30, 1990. Kyles filed a supplemental and amending petition on November 1, 1990.[2] Following exhaustion of state remedies, the district court ordered additional briefing. The court issued its Order and Reasons denying relief on March 24, 1992, JA 137, and issued its Judgment on March 30, 1992. JA 39.

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[1] References in this brief are being made to the following: record on appeal in the Court of Appeals as "RA"; Joint Appendix as "JA"; trial record as "R vol#"; trial transcript as "Tr"; state postconviction hearing as "H month/day". All postconviction hearings were held in 1989. Exhibits at the state postconviction hearing are referred to as "D-#"; Appendix B lists all exhibits with pages at which exhibit appears, is offered in evidence, and admitted.

[2] All proceedings were stayed in order to allow exhaustion of supplemental claims that have since been mooted by a statutory amendment.

On April 2, 1992, the district court granted a certificate of probable cause to appeal. On May 14, 1992, petitioner filed a motion pursuant to Fed.R.Civ.P. 60(b)(2) and (6) requesting the district court to reopen judgment.[3] The court refused to review the merits, finding that the motion constituted abuse of the writ. Petitioner filed a notice of appeal and moved the circuit court to consolidate the two appeals. The Fifth Circuit denied the motion to consolidate, holding that "a habeas petitioner may not use Rule 60(b) to raise constitutional claims that were not included in his original habeas petition." *Kyles v. Whitley*, No. 92-3310, 92-3542 (CA5 Aug. 7, 1992) (unpublished).

On appeal, petitioner argued three issues: the prosecution's nondisclosure of favorable material to the defense and presentation of false evidence violated due process, the prosecutor's threats of criminal prosecution to defense witnesses for crimes associated with the murder violated due process, and petitioner's trial counsel was ineffective. After briefing and argument, the Fifth Circuit affirmed the decision of the district court by a vote of 2 to 1. *Kyles v. Whitley*, 5 F.3d 806 (CA5 1993).[4]

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[3] In this motion, petitioner charged that one of the state's eyewitnesses had committed perjury. Attached to the motion is an affidavit of Darlene Kersh (formerly Cahill) wherein she states that the prosecution urged her to testify falsely. Kersh explains that she told the prosecutors and detectives she did not have an opportunity to view the assailant's face and could not identify him. Nonetheless, she assented to the state's wishes because of assurances that Kyles was guilty. RA. 22-41.

[4] Following this decision, Kyles again sought state collateral review, by alleging that Darlene Kersh, (formerly Cahill) a state witness at trial, committed perjury and the prosecution suborned this perjured testimony. The Louisiana Supreme Court granted discretionary review and ordered the trial court to conduct an evidentiary hearing. *State ex rel. Kyles v. Whitley*, 629 So.2d 1145 (La. 1993). Following this Court's grant of certiorari, the Louisiana Supreme Court stayed all proceedings associated with the state postconviction proceeding. *State ex rel.*

ii. Material Facts

Part I: *The Crime Through The Trial*

A. The Murder of Delores Dye

On September 20, 1984, at 2:20 p.m., Delores Dye came out of Schwegmann Brothers' Giant Supermarket and walked with her groceries to her car in the parking lot. There she was confronted by a young man who struggled momentarily with her over something she carried, either her purse or her car keys.[5] She screamed, attracting the attention of several witnesses. The man fired a gun into her head and then fled the parking lot in her car.

Within minutes, New Orleans police officers were on the scene. A description of the man responsible for the murder[6] was broadcast on all police channels, and all officers were additionally told to look for the victim's car, a 1977 red Ford Thunderbird.[7] JA 265.

The police took signed statements from Henry Williams, Willie Jones, Edward Williams, Lionel Plick, Isaac Smallwood, and Robert Territo. JA 188-213, 191. Each witness was in or around the parking lot during the shooting, and described the crime and the perpetrator.

The police questioned, Robert Dye, the victim's husband about any other property that might have been stolen in the armed robbery, D-16, and were told that a

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Kyles v. Whitley, No. 94-KP-0772, (La. May 5, 1998) (unpublished order).

[5] Witnesses differed on this and other facts. *See infra* at 14-15, 34-39.

[6] The police broadcast: "a black male, late teens to early twenties, five feet nine to five feet ten inches tall, one hundred and forty pounds, platted (sic) hair." Daily, D-16.

[7] The victim's car was an LTD. JA 276. A number of witnesses thought it was a Thunderbird. JA 265, 268-75.

child's toilet was probably in his wife's possession.[8] Tr 180. Dye informed the police, as he later testified, that the victim was shopping for the week and would likely have had a lot of groceries. Tr 181.

Delores Dye's car was recovered by the New Orleans police two days after the murder, late in the evening of Saturday the 22nd. A man identifying himself on the telephone as James Joseph[9], but commonly called Beanie, had informed the police that he had a car he thought belonged to the murdered woman.[10] Beanie met with Det. John Miller to surrender the car. He told Miller that Curtis Kyles had sold him the car the previous day, Friday September 21st, for $400.00.[11] Beanie said that the next day he either read or was told about the murder, and only then began to suspect that the car was the victim's. JA 215.

Early Monday morning the 24th, the police seized garbage bags from the street in front of the Desire Street apartment where Kyles lived; in one of those bags was found the victim's handbag containing various credit cards and other identifying information. Also found in the refuse were a number of Schwegmann grocery bags.

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[8] This information was the basis for including a child's toilet in the eventual search warrant. R vol I 96.

[9] JA 275. The man also used the names Joseph and Beanie Banks, JA 276, 227, and Joseph Brown, D-12. His real name was Joseph Wallace. Tr 92. He will be referred to herein as Beanie, as he was at trial.

[10] Beanie told the officer who answered the phone that he had purchased a red Thunderbird from a friend named Curtis on Thursday, September 20th. He said he then read about the murder in the morning paper and surmised that the car was stolen. JA 275.

[11] Beanie was acquainted with Kyles through Pinky Burnes. Beanie lived with Pinky's brother, Johnny Burnes, at Burnes's mother's home. Also, Beanie was romantically interested in Pinky. Kyles lived with Pinky and their four children. Tr 328-329.

Tr 66. The police arrested Kyles the same day, and served a search warrant immediately after the arrest. Seized pursuant to the warrant were a .32 revolver, found hidden behind the stove, a homemade holster, a number of bullets of varying calibers, including .32's, several cans of dog and cat food, a .22 rifle found between mattresses of Kyles's bed, and eight empty brown paper grocery bags from Schwegmann. R vol I 99, Tr 66.

After Kyles was in custody, Det. John Dillman, the case investigator, put together a photo lineup and went to the witnesses from whom he had taken statements following the homicide. Territo, Smallwood, and Henry Williams picked Kyles's photograph out of the lineup. R vol II 2-7. Edward Williams and Jones could not positively identify Kyles[10] and did not testify at trial. The record does not reveal whether Lionel Flick was ever re-interviewed.

B. *The Trial of Curtis Kyles*

1. The State's Case

Territo, Smallwood, and Henry Williams testified at trial that they saw the murder of Mrs. Dye and the armed robbery of her car and its contents. Tr 11-24, 40-58. Each testified to the photo lineup conducted by the police, and identified Kyles in court, as they had at the first trial and at the hearing on a motion to suppress their identification testimony. R vol II 11-32. Darlene Cahill (now Kersh) testified that she had been a passenger in an automobile travelling alongside the parking lot, saw the struggle, heard the scream and the shot, and turned back to see the woman fall. Tr 29-30. She said she saw the side of the man's face from about a car-length distance, and she too identified Kyles. Tr 31-32. Neither she nor the driver of

[10] This fact was evidenced only by Det. Dillman's testimony at the hearing on the motion to suppress. R vol I 10.

the car, her cousin, were ever asked to participate in any identification procedures. Tr 38.

The witnesses thought that the victim had struggled with the perpetrator over her car keys (Smallwood, Tr 42) or her purse (Territo, Tr 12). Territo said he could not see the object well because it was on the side of the woman's body away from him, but that he saw the perpetrator when the man passed him in the victim's car. At that time, Territo noted the license plate.

Smallwood and Territo both testified that the man's hair was braided. Tr 26, 48. On cross-examination they were asked if the photographs they had been shown included one of Beanie; they said no. Territo said that a week before the second trial he had been shown a photograph of Beanie and asked "if this here could have been the guy that did it. I told him no." Tr 24.

Henry Williams stated that the woman had placed her packages in the trunk of her car when the man first grabbed her. He said that she pulled away and ran a short distance, when the man grabbed her again and then shot her. He said it "had to be" her keys they struggled over. Tr 52.

Det. Dillman identified photographs of the garbage taken from the street in front of Kyles's apartment[11], and the items seized in the search following Kyles's arrest. Tr 65-75. He stated that there was no evidence of a cat in the house, and that he looked out the back window and did not see a dog. Tr 74-76. On cross he admitted that one of the police photographs of Kyles's apartment showed a half-empty bottle of Hartz flea shampoo in a chiffonobe. Tr 99.

Det. Dillman stated that the information provided by Beanie was the basis for the arrest of Kyles. Asked if Beanie was paid any sort of reward for this information Dillman acknowledged that he was paid $400, but said it

[11] The building at 2313 Dreiss housed four apartments, which used a common garbage area. Tr 101.

was to repay him for the purchase price of the automobile. Tr 94. When asked if Beanie was present at Kyles's house on Sunday, the night before the search was conducted, Dillman said he did not know. Tr 93. Dillman also denied knowing whether Beanie had changed the license plate on the victim's car; the plate itself, he said, had been stolen and had not been checked for fingerprints. Tr 95, 97-98.

Evidence established that the .32 revolver found behind the stove was the weapon used to murder Dye. Tr 108. The weapon, the purse and its contents, the pet food, and other papers found in the garbage outside the apartment were tested for fingerprints, but none were adequate for identification. Tr 135. Mrs. Dye's fingerprints could not be found on her purse and effects, nor on the cans of dog and cat food. Tr 98. Beanie's fingerprints were not compared to the partial prints lifted from the victim's handbag or car. Tr 97.

Kyles's fingerprint was found on a small 2" by 2" Schwegmann receipt on the passenger side floorboard of the victim's car.[10]

By spraying ninhydrin on the paper to lift prints, the police crime technician destroyed all writing on the paper, including the date. The prosecution's experts differed over whether this result should have been anticipated. Tr 131, 140.

Last to testify in the state's case in chief was the victim's husband, Robert Dye, who said that Mrs. Dye usually shopped for the week, and could be expected to have 6 to 10 bags of groceries; he said that they had two cats and a dog, and typically bought several brands of cat food.

2. The Defense Case

Kevin Black and Ronald Gorman, acquaintances of both Beanie and Kyles, said that they saw Beanie driving

[10] Kyles v. Whitley, 5 F.3d at 826 n.29. Tr 150.

the red car stolen from the victim on the afternoon of Thursday, September 20th, a few hours after the murder. Gorman said that Beanie offered to sell him the car for $200.00 on Thursday. The prosecutor asked Black on cross-examination whether he had any involvement in the crime.

Donald Powell was approached by Beanie on Friday the 21st, offering to sell him the victim's car for $300.00. He and Gorman were asked if they could have mistaken one man for the other; both said that Beanie and Kyles had similar facial features, but were different in height and weight. Tr 234-48.

Johnny Burnes told the jury he had seen Beanie with the car late the night of the 20th. Burnes watched as Beanie changed the license plate on the victim's car. Tr 260. Burnes also saw Beanie at Kyles's apartment Sunday night stooping by the stove and quickly rising when the witness came into the room. Burnes said there were a number of people at the apartment that night, socializing or sharing a meal. Tr 261-70. Carolyn Campbell and Cathora Brown testified that they attended the gathering at Kyles's, and verified that Beanie was there. Tr 291-318.

Curtis Kyles took the stand at his trial. He testified he had never seen the handbag found in the garbage. He said he had shopped at Schwegmann "thousands" of times. The cat and dog food found at the apartment were his purchases. The family had a dog which was usually kept in rural Mississippi. His son had a pet cat and fed stray cats, one grey cat in particular. This was confirmed by Cathora Brown, who testified that she had seen the puppy and witnessed Kyles's boy feeding his pet cat. Tr 308. Kyles stated that he had purchased several cans of dog and cat food because it was on sale; there was a "little sign" under the items showing the pet food to be 3 for something and 2 for something. Tr 341.

Kyles told the jury that he had seen Beanie driving the victim's red car on Thursday the 20th. On Friday, Beanie gave him a ride in the car to Schwegmann, where Kyles purchased some transmission fluid for his car at the

auto parts department. On Sunday, Beanie came to Kyles's apartment and offered to sell him a black .32 revolver. Kyles said he declined; at trial he produced a receipt for a different gun which he had legally purchased. Tr 323.

On cross Kyles was shown a crime scene photograph taken shortly after the homicide in which five cars are partially visible behind a police car. He was asked repeatedly if the car visible in the background was his car.[15] Kyles said it was not. Tr 346-47.

3. The State's Case in Rebuttal

The state recalled all four eyewitnesses and asked Beanie to enter the courtroom. Each witness testified that Beanie was not the murderer; each reaffirmed his or her identification of Kyles. The witnesses stated they had, by then, seen Kyles 3, 4, or 5 times in court. Tr 376-393. Schwegmann's director of advertising, Edwin Arceneaux testified that neither Nine Lives cat food nor Kal Kan dog food were on sale the week of the murder, and the products would have been marked only with "the regular shelf price", which was 2 for .77 (cat food) and 3 for .89 (dog food). Tr 395. After argument and instruction, the jury returned a verdict of guilty of first degree homicide.

4. The Penalty Phase

The state re-introduced its case presented at the guilt or innocence phase, and presented no other evidence. Kyles's sisters, Leilah Trask and Brenda Hall, and brothers, Roosevelt and Thomas Kyles, spoke of Kyles's love for his children and his close relationship with his family. Defense counsel argued, and the state conceded, that Kyles had no criminal history.

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[15] The state theorized that the man who killed Dye had driven to Schwegmann in his own car; they argued that the photograph showed a car that looked like Kyles's.

Curtis Kyles again took the stand and said that he had not killed Delores Dye. Tr 438. After argument by the state and defense, the jury recommended a sentence of death.

Part II: *Information Revealed Only After Trial*

This section lists the information and documents withheld at trial and revealed to Kyles in state postconviction proceedings. In the Argument below, Kyles demonstrates how competent counsel would have used these and additional undisclosed facts.

1. *Beanie's conversation with Detectives Miller and Eaton*

The night that Beanie called the police to tell them he had the victim's car, he met with Det. John Miller. Miller wore a body microphone; the conversation between the two men, later joined by Det. Eaton, was taped and has been transcribed. JA 221.

Beanie began by telling the police that he called to speak with the officers because he had bought a car from Kyles for $400 that he subsequently learned might be the victim's stolen car. He stated that Kyles sold him the car on Friday, about 6:00 pm, and that he brought Kyles back to Schwegmann on Friday night around 9:00 to pick up Kyles's car. JA 222. Beanie stated that Kyles took a brown pocketbook out of the bushes at Schwegmann. He said that Kyles had a "bush" hairstyle. Beanie stated that Kyles did not give him the title to the car, but that Kyles said he would bring it to him on Sunday.

On the tape Beanie recommends that the police search Kyles's garbage for the victim's purse. JA 257. At the postconviction hearing, the prosecutor conceded that he would have informed the defense that the search of Kyles's garbage was Beanie's idea, had he been aware of it at trial. H 2/20 148.

On the tape Det. Miller asks Beanie about the murder weapon. Beanie says "If you set [Kyles] up good, you can

get that same gun." JA 229. Beanie also tells the police several times that he wants money for informing on Kyles. "I ain't doing all of this for nothing, you know." JA 246.

A number of times Beanie expresses the fear that he might be a suspect in the murder since he had been seen in the victim's stolen car. "I betcha I can get in a lot of trouble for this shit," he says.[16] JA 228. He also reveals a knowledge of the crime: Asked where Kyles's car was parked in the lots surrounding the supermarket, Beanie replies, "On the same side where the woman was killed at."[17] JA 231. After expressing these concerns, Beanie states that he had been driving the car around the French Quarter.

Based on these conversations, the police knew that Beanie changed the license plate on the victim's car. As can be heard on the tape, the police call the dispatcher to have a check run on the license plate number. The dispatcher states the plate belongs to a stolen car. JA 241.

2. *Beanie's signed statement*

After the taped conversation, Beanie went to police headquarters, was interviewed, and signed a typed statement inculpating Kyles. JA 214. Beanie said that, after buying the red car from Kyles on Friday, he helped Kyles move groceries and a woman's handbag from the victim's car into the trunk of Kyles's car, then followed him from

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[16] Beanie's repeated expressions of concern on this point are the critical context for evaluating the police officer's numerous requests for information. "Am I going to get put in jail?" JA 235. "I coulda been charged with that [murder]." JA 246. Det. Miller combines reassurances ("You did the right thing") with inquiries about the missing evidence, the murder weapon, and Kyles's past.

[17] At the postconviction hearing, the prosecutor said it "never occurred" to him to ask how Beanie knew this. H 2/20 130.

Mazant Street back to the Desire Street apartment where he helped unload Kyles's car. But he also said that he gave Kyles a ride to the Schwegmann parking lot where Kyles picked up his car much later that same Friday evening. JA 218. Prosecutor Strider admitted, at the post-conviction hearing, that this inconsistency might have been helpful to the defense and "would certainly not be beneficial" to the state. H 2/20 133.

3. *Beanie's interview with the prosecutor*

Prosecutor Cliff Strider testified at postconviction proceedings that he did not interview Beanie until after the first trial because

> I didn't think he was important to the case before we tried the case the first time. That trial resulted in a hung jury. At that time I requested the Homicide Department to locate Mr. Wallace so I could interview him.

H 2/20 101-02. Strider took notes during the interview. JA 258-63. In the interview, Beanie admitted changing the license plate. JA 261. He also discussed his visits to Kyles's apartment on Sunday, the evening before Kyles was arrested, and the evening on which Burnes testified he saw Beanie stooping near the stove. Tr 263. Beanie told the prosecutor he went to Kyles's apartment twice on Sunday; when he left the second time, it was to meet again with Det. Miller. JA 262. At trial, Det. Dillman testified that he "ha[d] no idea if" Beanie was at Kyles's house on Sunday night. R vol II 93.

According to the notes, Beanie helped Kyles retrieve his car from the Schwegmann lot on Thursday evening at 7:30. JA 258. He further stated that he bought the victim's car from Kyles on Friday morning at 11:00. JA 259.

Beanie also stated that Kevin Black was a participant in the unloading of the victim's possessions from her

stolen car. Black does not figure at all in the first two versions of Beanie's story.[18]

The notes also reveal that Beanie said that after he "bought" the victim's car, he "pulled out – hit fence – scratched on passenger side (rear)". JA 260. The only other reference in the record of minor damage to the victim's car is from an unrelated witness, as explained below.

4. *The police computer print-out of license plates*

The police theorized that whoever committed the murder drove to Schwegmann in his own car, which he necessarily left there when he stole Dye's automobile. At trial the state confronted Kyles with a magnified photograph of the crime scene, taken within hours of the murder. In the background the roof of a car is visible; the prosecutor argued it was Kyles's. Tr 347.

A New Orleans Police Department Interoffice memo to Det. Dillman from three other detectives, concerning the Dye homicide, reads as follows:

> John,
>
> Attached you will find a print out of vehicles which were parked in the parking lots around Schweggmans [sic] on 9-20-84 at 9:15pm.

D-7. The four-page computer print-out lists the license plates, followed by the names and addresses of registrants. Kyles's name is not on the list.

5. *The eyewitnesses' initial statements*

Territo, Henry Williams, Jones, Edward Williams and Smallwood signed typed statements, describing the events they witnessed on September 20th and the man

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[18] Black testified at the first trial that he saw Beanie in the victim's car the day of the murder; Black was inculpated for the first time in Beanie's between-trial interview.

they saw. Trial counsel asked in his pretrial motion for particulars for any descriptions by witnesses. R vol I 117-8. The state responded that the defense was not entitled to witness statements under *Brady v. Maryland*, 373 U.S. 83 (1963). The statements were not disclosed to Kyles until postconviction.

The statements diverged on a number of descriptors. Heights ranged from 5'4" to 6'; age from 17 to 28 years old; hair from shoulder length to short. Smallwood saw a mustache, no one else saw facial hair. Every observer who remembered the man's hair said it was plaited, worn in braids. *See* App. C for a detailed account.

The eyewitnesses disagreed on what they saw as well. Plick did not see what object occasioned the struggle between the victim and the man; Edward Williams thought it was a purse, and Territo described a purse with a strap; Jones said the victim's purse had been locked in the trunk and the two fought briefly over her keys. Isaac Smallwood's initial statement and his trial testimony varied greatly; he initially told the police that he had not seen the murder, but at trial he described the crime as if he had witnessed it. *See* 34-37, *infra*.

Trial counsel asked questions about the substance of the initial statements during the pretrial hearing on suppression of the identifications. R vol II 7-8. Det. Dillman's responses characterizing the physical descriptions are compared to the actual statements given by the witnesses at 40-41, *infra*.

6. *Police report about the Crozat Street accident*

The evening of the homicide a man came to the police to report seeing a car resembling the victim's car on Crozat Street, near the French Quarter of New Orleans. The undisclosed report, entitled "Homicide at 5300 Gentilly Road," was routed to Det. Dillman. The citizen who came forward said he saw the car swerve onto a sidewalk, striking a parking meter. The citizen

twenty-eight years. Also, Smallwood's written statement claims the perpetrator had a light mustache and his braids went to his shoulders.[15] However, there is no reason to believe that Dillman's testimony did not represent his good faith recollection at the time, and he was not far off the mark. The discrepancies in the written statements of the eyewitnesses are within an expected range. The age, height, and weight discrepancies in the written statements do not contradict the testimony of the eyewitnesses in court and do not suggest that Beanie may have been the perpetrator. It must be recognized that had Dillman's estimates been more accurate Kyles might have inquired into these discrepancies at trial, slight as they were. These written statements would have been of very limited value, if any, to Kyles. The State submits that existence of the minor discrepancies in these statements is exactly what the Court had in mind when it held in *Bagley* that exculpatory evidence must not only be favorable, but also material, before the state must provide it to the defense.[16] The statements did not constitute material exculpatory evidence.

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[15] J.A. 189. Smallwood's written statement also contains a claim that he did not see the incident before the shot was fired. This is treated in the next part of this argument.

[16] *United States v. Bagley*, 105 S.Ct. 3375, 3380 n. 7 (plurality opinion): " . . . [A] rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments."

b. Isaac Smallwood's Testimony

Shortly after the murder Isaac Smallwood gave the police a written statement in which he stated that he was standing near the gas pumps on the Schwegmann parking lot when he heard a loud pop. "When I looked around I saw a lady laying on the ground, and there was a red car coming toward me." J.A. 188-190. He stated that he did not see a weapon, that the car passed near him, and he thought he could identify the person driving the car.

Smallwood's testimony at Kyles's first trial was consistent with his written statement to police shortly after the murder. Smallwood testified during the first trial that he heard the shot and when he looked in the direction from which the shot came the lady was already on the ground.[17]

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[17] At Kyles' first trial, on November 26, 1984, the prosecutor asked Mr. Smallwood what he saw, to which Smallwood responded:

> A. Yes, me and my co-workers, we were standing by until my foreman come back from Schwegmann's from using the telephone, and see I had my back turned to the Chef [highway], and that's when *I heard something went off*; that's when my podnah, Henry [Williams], he said "a woman over there got shot," *so I looked over there towards the lady laying on the ground*, and the guy got up into this woman's car and passed me by in the lot.
>
> - - - - -
>
> Q. *When you looked over there*, what was that individual doing? The lady – *was the lady already on the ground?*
>
> A. *Yes.*
>
> Q. And what was the individual who drove the car, what was he doing?

At the second trial, however, Smallwood testified that he saw the whole incident, including the shooting itself. Nevertheless, Regan, defense counsel at both the first and second trial, was present and heard Smallwood's testimony. Therefore, Regan was, or should have been, aware of Smallwood's testimony regarding the sequence of events. Apparently Regan did not conclude that the discrepancy was worth examining on cross-examination, or perhaps did not even notice the discrepancy because it pertained to a fact which was not questioned at the trial – that the same man who drove Mrs. Dye's car off the parking lot had also shot her.

Kyles now claims that the state should have provided Smallwood's written statement, because that statement partially contradicts his testimony at the second trial. Kyles fails to point out that Smallwood's testimony at the first trial also contradicts his testimony at the second trial, and Regan was present at both to recognize the discrepancy himself. Thus, Smallwood's written statement would not point out any discrepancy which should not have already been apparent on the face of Smallwood's trial testimony. Neither Kyles's defense counsel nor the prosecutors paid attention to the difference in

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A. He just got in the car like it was his own car, and eased over, I guess going on about his own business.

Tr. Trans., State v. Curtis Kyles, Criminal District Court, No. 304-163, testimony of Isaac Smallwood at trial on the merits, 11-26-84, p. 50, 51.

At the hearing on Kyles's postconviction application for habeas corpus relief, during the testimony given by his trial attorney, Martin Regan, the judge took judicial notice of the testimony at the first and second trials. Hearing, 2-20-89, testimony of Martin Regan, p. 5.

testimony between the first trial, which was consistent with the statement, and the testimony at the second trial. The difference was inconsequential.

The Fifth Circuit majority, treating this discrepancy, stated:

> Kyles overlooks, however, that Smallwood consistently stated that the gunman then drove the LTD close by him. Smallwood always maintained that he got a good look at the killer then, and like Williams, immediately recognized Kyles in the photographic lineup. Smallwood never made a statement calling his ability to recognize the gunman into question, and we are not persuaded that use of this material by the defense would have undermined the force of his identification, particularly in light of its corroboration by others.
>
> J.A. 55

B. ALL PHYSICAL EVIDENCE PRODUCED BY THE STATE AT THE TRIAL IMPLICATED KYLES AS MRS. DYE'S MURDERER.

Additional supporting evidence offered by the state during the guilt phase of the trial included: (1) a Schwegmann's sales slip found in Mrs. Dye's automobile which contained two of Kyles's fingerprints; (2) the murder weapon (.32 cal. pistol) found in Kyles' residence behind a kitchen stove; (3) Mrs. Dye's purse, personal papers, and credit cards, found in a trash bag outside Kyles' residence; and (4) Schwegmann's shopping bags seized from Kyles' kitchen, along with cans of the same brands of pet food often purchased by Mrs. Dye.

II.

KYLES HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL.

Kyles initially claimed that his trial counsel, Martin Regan, was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). He did not pursue this argument in his brief to this Court, although effective performance of trial counsel is one of the issues approved by the Court for review. The Court of Appeals considered only the claim that counsel was ineffective because he did not interview Beanie and call him to the witness stand at trial as a defense witness. This limited claim is treated here because the dissent in the Court of Appeals decision addressed the issue at some length. J.A. 93-97, 108-109.

Martin Regan represented Kyles at trial. Regan is a respected New Orleans attorney who, at the time of Kyles's trial, had tried over one hundred jury trials and participated in at least three capital trials. H 2-20-89, p. 2. Judge Waldron, who presided over the trial and the state postconviction hearing, concluded that "Mr. Regan provided the defendant with a vigorous, dedicated and more than adequate defense."[18]

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[18] Judgment, J.A. 31. Judge Waldron continued, "As he always has been, in the many cases he has tried before this Court, Mr. Regan was a tenacious advocate on behalf of his client. His reputation as an attorney who is always prepared for, familiar with his case, and professional in his presentation remains intact despite the outcome of this particular case." J.A. 31-32.

Regan testified at the postconviction hearing that he did not call Beanie as a witness at the trial because he erroneously thought that under Louisiana law Beanie must be hostile and his testimony must be surprising before Beanie could be cross-examined. The State submits that Regan's decision, even if based upon an erroneous understanding of the law, was proper and Kyles suffered no prejudice from the decision.

If Regan had called Beanie as a witness the likelihood is that Beanie would have refused to testify and invoked a "blanket" Fifth Amendment privilege.[19] Under Louisiana procedure the determination as to Beanie's right to assert his Fifth Amendment privilege would have been made outside the jury's presence and the invocation by Beanie would not, as the dissent suggests, "have presented Kyles with valuable ammunition supporting the theory of the defense." J.A. 108. *State v. Berry*, 324 So.2d 822, 829-830 (La. 1975). Indeed, in Louisiana it is improper conduct for either the prosecution or the defense knowingly to call a witness who will claim a privilege, for the purpose of impressing upon the jury the

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[19] As Judge King pointed out in her dissent, "[t]he entire purpose of calling Wallace [Beanie] would have been to expose his leading role in the development of the prosecution's case, to impeach him and, in the process, to accuse him of framing Kyles and suggest that Wallace had some role in the murder." J.A. 97. However, Judge King was incorrect in concluding that there was a "serious question" as to whether Beanie could have taken a "blanket" Fifth Amendment privilege as to all questions asked. Under Louisiana law Beanie had the right to assert such a blanket privilege, since the evidence introduced by the defense implied that he was the perpetrator. *State v. Savoy*, 537 So.2d 246, 249-250 (La. App. 4 Cir. 1988).

fact of the claim of privilege. *State v. Berry, supra,* at. 830.[20] Once the defense called Beanie the trial court, which was aware of the defense tactic involved, surely would have advised Beanie of his rights and assigned counsel to advise him, as the court did with two other witnesses who appeared on behalf of Kyles.[21]

In the unlikely event that Beanie was called to the stand and did not invoke his Fifth Amendment privilege, he would have surely testified that, as he told police, he purchased Mrs. Dye's car from Kyles, he helped Kyles remove Mrs. Dye's groceries from her car, he took Kyles to Schwegmann's to retrieve his own car, and he knew Kyles carried a .32 cal. pistol. This evidence was not presented by the State, although some of it was brought out on cross-examination of other witnesses by the defense.

To Kyles, Beanie was at best a "loose cannon," as the Court of Appeals majority noted. J.A. 70. Regan could have cross-examined, but his cross-examination would,

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[20] The Louisiana Supreme Court cites as authority for its conclusion the American Bar Association Standards of Criminal Justice, Relating to the Prosecution Function, Standard 5.7(c), and Relating to the Defense Function, Standard 7.6(c) (1971). *Id.*, p. 830.

[21] The trial court appointed an attorney to advise defense witnesses Kevin Black and Johnny Burnes regarding their right to assert their Fifth Amendment privilege, once it became apparent that they may have been accessories after the fact to the murder. R. vol. 2, pps. 194-202. This was done outside the presence of the jury and the procedure was approved in this case by the Louisiana Supreme Court. *State v. Kyles*, 513 So.2d 265, 271-272 (La. 1987), J.A. 12-14.

under Louisiana law at the time, have been limited to impeachment, and, even then, "the impeachment must be limited to evidence of prior contradictory statements." La. R.S. 15:487; see J.A. 32. Contrary to the argument of the dissent below, the limitation of Beanie's cross-examination to impeachment would have prevented or at least drastically limited exploration by Kyles of his claim that Beanie was the murderer. It would also have prevented exploration of other aspects of Beanie's life, such as his prior arrests or possible involvement in crimes other than the murder of Mrs. Dye.

Martin Regan made the correct decision when he decided not to call Beanie as a witness at trial.[22]

III. THE STATE DID NOT FAIL TO DISCLOSE FAVORABLE MATERIAL EVIDENCE, AND DID NOT PRESENT FALSE EVIDENCE AT TRIAL.

The State emphatically denies Kyles's claim that the prosecutors and the police in Kyles's case suppressed information which was favorable and material to Kyles's defense, and used "false" evidence at his trial. The record simply does not support Kyles's charges. An examination of these claims shows that the police and prosecutors acted in good faith in preparing and presenting an overwhelming case against Kyles, and the items possessed by the police about which Kyles now complains did not constitute material exculpatory evidence.

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[22] The Court of Appeals majority treats *Strickland* at J.A. 69-73.

While Kyles has made many claims, they are all without substance. As the federal district court commented while considering Kyles's claims below, "Twenty times zero is still zero." J.A. 180.

A. THE STATE WAS NOT BOUND TO SUPPLY EVIDENCE OF BEANIE'S CHARACTER OR CREDIBILITY.

The Court of Appeals majority noted the fact that the State neither called Beanie as a witness nor informed the jury of the contents of his initial tip to police.[23] As that majority stated, "[p]rosecution witnesses did not mention Beanie by name except in response to the cross-examination by [defense attorney Martin] Regan." J.A. 69. Thus, the State did not recommend Beanie's character or credibility to the jury, and, because neither party called Beanie as a witness, his character and credibility were not issues at the trial. The State did not even claim that Beanie was an innocent purchaser of Mrs. Dye's vehicle,[24] and did not propose a theory of the case to the jury in which Beanie played a part. Beanie "made our case," as prosecutor Strider testified, by providing Kyles's name to police, thus enabling them to conduct photographic lineups with the witnesses which included Kyles's picture.[25]

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[23] Opinion of the Fifth Circuit Court of Appeals, at J.A. 58.

[24] The Fifth Circuit majority noted that the " . . . state never urged and no prosecution witness ever stated that Beanie was an innocent buyer." J.A. 58.

[25] H 2-20-89, testimony of Cliff Strider, p. 116-117. United States District Court Judge Arceneaux stated: "Beanie's testimony and good character were not an issue. Beanie supplied a name. That is virtually all he did." J.A. 169.

However, the State was not obligated to provide evidence of his character, his credibility, or his lack of credibility.

B. THE STATE DID NOT SUPPRESS ANY FAVORABLE MATERIAL EVIDENCE WHICH SHOWED EITHER THAT BEANIE FRAMED KYLES OR MURDERED MRS. DYE.

Kyles claims that the record contains a strong inference that Beanie had a deal with the State for favorable treatment in exchange for information,[26] and implies that the State covered up Beanie's acts in framing Kyles. The record does not support this allegation.

Kyles was convicted of first degree murder less than three months after his arrest. During this brief period the prosecutors, Cliff Strider and Jim Williams, prepared their case for trial by interviewing the homicide detectives assigned to the case, particularly the case officer, Det. Dillman, and homicide Det. John Miller. The prosecutors also interviewed the witnesses to the shooting and had access to some of the police "dailies." They did not receive the police homicide report until after Kyles was tried and convicted.[27]

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[26] Petitioner's brief, p. 35.

[27] The homicide report in this case was forwarded to the District Attorney's office on December 10, 1984, two days after the trial had been completed. Testimony of Cliff Strider, H 2-20-89, p. 102-103, 107-108; testimony of Det. Robert Kessel, H 3-3-89, p. 25.

The police never considered Beanie a suspect in the Dye murder.[28] After the first trial, when Kyles introduced his defense that Beanie had perpetrated the murder, prosecutor Cliff Strider interviewed Beanie for the first time and satisfied himself that Beanie was not the murderer.[29] Beanie was clearly an unsavory character, an informant whom Det. Miller believed to be "a con-man, drug user at times, [and] thief,"[30] a man who was well acquainted with Kyles and his friends,[31] but who was not Mrs. Dye's murderer.

Since the police and prosecutors did not consider Beanie to be the murderer, they did not view their relations with him or his activities to be favorable material evidence which Kyles could use in his own defense. Kyles's complaints regarding evidence the police possessed about Beanie are as follows:

1. The Tape of Beanie's Meeting with Det. Miller on Saturday, September 22, 1984.

The Saturday evening meeting between Det. John Miller and Beanie was their first time to meet in person.[32] Sgt. Eaton placed a microphone on Det. Miller before Miller went to the meeting because he was not sure what

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[28] H 2-24-89, testimony of Det. John Miller, p. 22; testimony of Det. John Dillman, H 2-24-89, p. 71.

[29] H 2-20-89, p. 141.

[30] H 2-24-89, testimony of Det. John Miller, p. 22.

[31] *Id.*, p. 24.

[32] H 2-24-89, p. 2, testimony of Det. Miller.

Beanie had in mind and wanted to protect Miller.[33] The tape was not brought to the district attorney's office until after the trial and was not seen by prosecutors before trial.[34] Det. Dillman did not listen to the tape because police had obtained Beanie's written statement.[35]

Petitioner claims that five parts of the tape contain exculpatory material:

a. The tape shows that Beanie knew where the murder occurred.

Beanie brought Det. Miller and Sgt. Eaton to the location on Schwegmann's parking lot where Beanie claimed Curtis Kyles' automobile was located when he and Kyles retrieved the automobile. Beanie pointed out that was the "same side where the woman was killed at." J.A. 231. He told police that he followed news accounts of the murder, which contained photographic information showing where the shooting occurred.[36] Petitioner argues that Beanie's knowledge of where the murder occurred indicated information which only the perpetrator would know. This conclusion is incorrect.

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[33] Testimony of Det. John Miller, H 2-24-89, p. 26; testimony of Sgt. James Eaton, H 3-3-89, pps. 58-59.

[34] H 3-1-89, pps. 5-6, testimony of assistant district attorney Jim Williams; H 2-20-89, pps. 103-108, 110, testimony of assistant district attorney Cliff Strider.

[35] H 2-24-89, pps. 58-59, testimony of Det. John Dillman.

[36] "I picked up on it when I seen the news and I seen it in the parking lot, and the car was right there." J.A. 229.

Photographs of the murder scene were in New Orleans newspapers and filled New Orleans television, and Beanie carefully followed both. J.A. 247. Prosecutor Cliff Strider concluded in postconviction testimony that everyone who lived in the area knew where the murder occurred.[37] This statement on the tape would have been of no value to Kyles at trial.

b. Beanie made a remark on the tape regarding Kyles's hairstyle.

On the tape Det. Miller asked Beanie about Kyles' hairstyle, which Beanie described as "bushy." J.A. 249. Det. Miller asked Beanie: "Does he ever wear it in plaits?," to which Beanie answered "Uh-huh." *Id.* That is, Beanie signified that Kyles did sometimes wear plaits, the hair style used by the perpetrator at the time of the murder, but Kyles had a bush on "that day," referring to the day after the Dye murder, when Kyles sold him the car. Kyles would have been unlikely to have kept the plaits after a parking lot full of people saw him murder Delores Dye. It is not surprising that the following day he was wearing a bush style hairdo, and the police properly

[37] H 2-20-89, testimony of Cliff Strider, p. 130: " . . . it was on the T.V., it was on the radio, it was in the newspaper, and I think it was the talk of the town. I mean everybody knew where that occurred. I was in another trial and I knew." Even when the murder first occurred, Strider knew the precise location of the murder: "Near where the old pumps used to be." *Id.* Det. John Miller also emphasized that the case was "played up" on television and in the newspapers. H 2-24-89, p. 15.

attached no significance to the matter.[38] Indeed, if Beanie had been trying to frame Kyles he should have claimed that Kyles wore plaits.

c. Beanie requested on the tape to be reimbursed for the price he had paid for the automobile.

There was never any question that Beanie received money from the police. Det. Dillman acknowledged at the trial, in the presence of the jury, that Beanie was repaid the money ($400.00), he allegedly lost on the car.[39] Det. Miller checked the records during postconviction proceedings and determined that police had paid Beanie a total of $600.00, and this fact was reported to the court.[40]

d. Beanie suggested on the tape that Kyles might put incriminating evidence in his garbage.

Beanie suggested to Sgt. Eaton and Det. Miller that Kyles' garbage "goes out tomorrow" and said "if he's

[38] Det. John Miller correctly noted in his postconviction testimony: "Well, if I committed a crime and I looked one way, I would do something to alter my appearance, to try and change my identity or the possibility of somebody identifying me." H 2-24-89, p. 50. Miller also testified that there is "nothing difficult at all" about changing a hair style from plaits to a bush. *Id.* It should also be noted that a police photograph taken on June 6, 1984 shows that Beanie was wearing a Jherri curl, not plaits, fifteen weeks before the murder. J.A. 53.

[39] Trial transcript, vol 2 p. 94.

[40] H 2-24-89, p. 20.

account of how he came to be in possession of the murdered woman's car and their willingness to play into Beanie's hands. These include Beanie's criminal history and contemporaneous criminal charges.

Beanie came to the police an experienced informant.[31] He had an arrest for first degree murder in 1980, which had resulted in a plea of guilty as an accessory to murder and a two-year prison term.[32] H 2/20 98, D-6. He had open charges, for felony theft and possession of stolen property, offenses which occurred in June of 1984, three months before the Dye homicide *at the same location*, the Schwegmann supermarket. D-6. At the postconviction hearing, prosecutor Williams admitted that certain informants are given some latitude in their own behavior in exchange for information they might provide, stating, "I can't tell you specifically, [in this case] but I know it's a fact. There's no question.". H 3/1 27-28. The postconviction record contains strong evidence to compel the inference that Beanie had a deal with the state for favorable treatment in exchange for information. Beanie's responsibility for another murder was not confirmed until his own statement of December 12, 1984, D-9, but substantial evidence had been gathered before Kyles's second trial. An anonymous caller reported seeing Beanie trying to

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[31] His initial call was routed to Det. Miller because Miller had dealt with him in the past. H 2/24 2-3. Both Det. Eaton, who accompanied Miller during the first contact with Beanie, and Det. Dillman claimed no knowledge of Beanie's informant status. H 3/3 58; H 2/24 64. Williams, the prosecutor, testified, however "I knew he was an informant." H 3/1 19.

[32] Dillman admitted being aware of Beanie's lengthy arrest record, but saw no implications for his credibility as a source of information. H 2/24 71. Compare this opinion to Det. Ray Miller's statement that defense witness Gorman's information could not be believed because of Gorman's record. H 3/3 42.

sell silver objects stolen in the burglary/murder.[33] Burnes and Gorman had sworn that Beanie confessed the murder to them. Madison Marshall also told the police he had overheard this admission. D-12. Beanie's former girlfriend Valerie Brown had implicated him in several offenses, including forging the murder victim's checks; Beanie was positively identified as the forger by the store owner who cashed the checks. D-12. Beanie was arrested for three counts of forgery, arrested the hour that Kyles's jury retired to deliberate his sentence. Incident Report, D-12 Item # L-8299-84.

The three counts of forgery were eventually refused for "insufficient evidence". D-6. *Beanie was never charged with Patricia Leidenheimer's murder.* This preferential treatment is so astounding it can only be understood as the state protecting its "victory" in petitioner's case. It is not difficult to speculate about the effect on a jury had they been told that there was substantial evidence that Beanie had shot a middle-aged woman in the face nine months before another helpless woman was shot in the temple.

4. The Suppressed Evidence Would Have Supported The Defense Witnesses

Knowledge of Beanie's presence at Kyles's apartment on Sunday night would have greatly strengthened Burnes's credibility. Burnes told the jury he had seen Beanie stooping by the stove where the gun was found. JA 263.

Burnes' credibility could have been further corroborated by Beanie's admission that he changed the license plate. Burnes testified at trial that he saw Beanie take a license plate off "an old car by the tracks" and put it on the victim's car. Tr 260. The police dispatcher can be heard on the taped statement telling Det. Miller that the

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[33] This report, by a man who identified himself as a former employee of the New Orleans Police Department, was received on September 11, 1984.

plate is registered to a car reported stolen. JA 241. Burnes is the only witness who is right that the car is stolen. Det. Dillman tells the jury that it was the plate itself that was stolen. Tr 260, 206.

The state theorized that Kyles parked his car at Schwegmann and drove off in the victim's car. Kyles took the stand in his own defense and testified that Beanie gave him a ride to Schwegmann on Friday in the victim's car.[34] Kyles denied being at Schwegmann on Thursday. Kyles was confronted at trial with a magnified photograph of the crime scene: in the background is visible a portion of a car the prosecutor argued was Kyles's. Tr 347.

The evening of the murder the police listed the license plates of cars in the vicinity of the supermarket, and ran a computer check on them. D-7. Det. Miller equivocated at the postconviction hearing, stating that the police might have failed to get "all" the license plates. "[I]t was a very large parking lot, there were many cars. . . ." H 2/24 11-12. Accompanying the computer list is a "Police Interoffice" memo referencing the list of "vehicles which were parked in the parking lots around Schweggmanns on 9-20-84 at 9:15pm." D-7. The store closed at 9:00. D-23. Kyles's license was not on the list. The jury was entitled to decide whether or not the computer print-out deflected the state's attempt to imply that Kyles's car was in the photograph.

Beanie admits driving the victim's car around New Orleans and in the French Quarter in the suppressed statements. Defense witnesses Powell, Gorman, Black and Kyles himself all testified that they saw Beanie driving the victim's car. More importantly, the suppressed information from prosecutor Strider's interview of Beanie provides valuable insight into the state's attempt to impeach

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[34] The purpose of the lift was to purchase a can of transmission fluid and cigarettes from Schwegmann, not to retrieve his car from the lot after hours, as Beanie told the state.

Black. On cross-examination, the state insinuated that Black had participated in the loading and unloading of the victim's possessions.[35]

After the first trial ended in a hung jury, Beanie became important to the state, and Kevin Black became important to Beanie. Prosecutor Strider decided to interview Beanie after the trial and his handwritten notes of his interview with Beanie tell a story that differs remarkably about Black's role. Black's name was never previously mentioned by Beanie; it is on every page but one in Strider's notes. JA 258. According to the story Beanie told Strider, Black was one of the people who helped load and unload many bags of groceries, and a baby toilet and a lady's handbag from the red car. In fact, Beanie said that he bought the car, not on Mazant Street with the unknown Ricky present, as he had said in his earlier statements, but at Black's apartment.

The suppression of this alteration in Beanie's stories must be considered in context: the interview took place between the two trials. At the first trial Black, a citizen with no criminal record, testified as he did at the second trial, that he had seen Beanie in the victim's car on Thursday night. Between the two trials Beanie adjusted his story to implicate Black. The patent attempt to discredit a defense witness with a fabricated story should have been disclosed to the defense. Instead, the state used Beanie's invention to formulate a series of confusing and improperly suggestive hypothets and

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[35] Trial counsel Regan said that Black's testimony was substantively the same in the second as in the first trial, although his demeanor was drastically altered for the worse by the state's improper threats of prosecution. H 2/20 34. *See* Argument II B, *infra*.

asked them of Kevin Black on cross.[36] When he said "No" to them all, Strider threatened him with a perjury prosecution.[37] Tr 217.

5. The Suppressed Evidence Was Relevant To The Credibility Of The State's Witnesses

Smallwood was a strong witness for the state, and was not impeached. Cross-examination was just over 20 lines of transcript. Counsel was only able to bring out the fact that Smallwood never did see the assailant's full face, only a side view. Tr 49. As shown below, counsel would have devastated Smallwood's credibility on cross-examination had Smallwood's statement, given shortly after the crime, been disclosed. *See McDowell v. Dixon*, 858 F.2d 945, 949 (CA4 1988) (holding that inconsistent initial statement "would have weakened the victim's credibility, as well as the accuracy of [the] identification").

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[36] *See United States v. Robinson*, 8 F.3d 398, 413 (CA7 1993) ("A prosecutor may not ask a question 'which implies a factual predicate which the examiner knows he cannot support by evidence.' ") (citation omitted).

[37] Two other defense witnesses, Gorman and Burnes, were also threatened. Beanie threatened to kill them after they testified at the first trial. D-13, D-16. From a self-confessed murderer, such threats are not to be taken lightly. Nevertheless, the record is devoid of the state taking any action whatsoever after both the prosecutors and the police were informed of the threats to witnesses.

Initial Statement	Trial Testimony
I heard a lound pop. When I looked around I saw a lady laying on the ground, and there was a red car coming toward me.	A: Well, me and my partner was standing by the gas pump in Schwegmann's parking lot. My partner seen this guy was wrestling with this lady. We thought they was just playing with one another, thought they know one another. So the guy, he snatched her hand. When he snatched her hand, she wouldn't release her keys from her hand, so he just went up in his pocket and shot her in the head. Q: He shot her? A: Yeah he shot her.
Q: When you heard the shot, and looked toward the lady on the ground, was the black man standing near her? A: No. He was already in the car coming toward me.	Q: . . . After he shot her what did he do? A: He just let her fall on the ground. He walked toward the driver's side and then put the keys in the car and just eased off.
Q: Did you at any time see a weapon? A: No.	Q: Did you see a gun? A: Well, it was like a small .32, a small black gun. Q: Did you see where he took it from? A: He took it out of his right pocket.

Q: Do you know what type of vehicle it was he was driving? A: It was a red thunderbird. Maybe a 78 or 79.	Q: What kind of car was this? It was a red LTD.
When I looked around I saw a lady laying on the ground.	Q: Did you see her fall? A: Yeah.
The car then turned right on Chef Hwy, and he stopped for the red light, then he started to make a right turn but there was cars backed up so he backed up and went over the bridge.	. . . He got to the intersection of Chef. . . . He got down and took another right on France

JA 189-90 (sic passim). Tr. 41-44 (sic passim).

Smallwood's testimony is irreconcilably inconsistent with the statement he gave moments after the crime. Smallwood's prior statement most assuredly would have cast grave doubt on his credibility. Was he being honest at trial? Was he mistaken about what he witnessed when he was interviewed by the police at the crime scene? The answers matter little. What matters is that the triers of fact were completely unaware that Smallwood's trial testimony was radically different from his statement. It is the province of the finders of fact to assess the credibility of a witness. By hiding the statement, the prosecution prevented the jury from performing this primary function, and successfully prevented Kyles from subjecting the state's case to meaningful adversarial testing. The

statement would have been fuel for "the greatest legal engine."[38]

Examination of the six undisclosed eyewitness statements shows cogent grounds for impeachment of the accuracy and reliability of the state's eyewitnesses. These should have been disclosed to the defense. *See* Appendix C.

The statements diverged on virtually every descriptor. Henry Williams saw a man 5'4" tall, JA 197, but Territo said he was 6' tall. JA 194. Jones and Smallwood thought the man was 17 years old, JA 202, compared to Territo who said he was 28 years old. JA 194. All the witnesses saw braided or plaited hair, yet Smallwood saw "braids [that] looked like they went to his shoulders," JA 189, while Henry Williams saw "short" hair. JA 197. Smallwood was the only witness to see a mustache. JA 189.

Trial counsel asked for initial statements because even slight variations can make for instructive impeachment.[39]

That is the biggest lost opportunity for the defense. With each witness' statement compared to all other eyewitnesses' initial statements, Kyles could have demonstrated that even honest and well-meaning observers of sudden horrific violence differ about what they think they see. As Judge King noted in dissent below, "the effective impeachment of one eyewitness may have consequences that extend to another, unshaken eyewitness."

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[38] Cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, Evidence § 1367 (Chadbourne Rev. 1974).

[39] "One of the most convincing ways of impeaching any witness is by confronting him or her with a prior inconsistent statement."

Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* (1989) at 143.

5 F.3d at 839.[40] *See also Lindsey v. King*, 769 F.2d at 1042-43, ("the destruction by cross-examination of the credibility of [an eyewitness] may have consequences . . . extending far beyond the discrediting" of that witness).

Particularly problematic is photographic selection: problems inhere in the process which are not intuitively apparent. Choosing a perpetrator from a photographic lineup is a "relative-judgment process" in which one selects the individual who best matches the perpetrator because there is a strong tendency for eyewitnesses to believe that the actual perpetrator is among the photographs. Wells, *What Do We Know About Eyewitness Identification?*, 48 Amer. Psychologist 553, 560 (1993). Studies have proven that "the information to which a witness is exposed after an event becomes integrated into the witnesses' memory of the event." Gorestein & Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 J. Applied Psychol. 616, 618 (1980). *See also* Loftus & Greene, *Warning: Even Memory for Faces May Be Contagious*, 4 Law & Human Behavior 323 (1980). When a witness selects an incorrect face and that face is similar to the one originally viewed, "the new face will replace the memory of the old face." Gorestein & Ellsworth, *supra*, at 621.

Also significant here are the comments made to the witnesses after their selection at the photo lineup. "Whatever police might say to eyewitnesses soon after their identification decisions is likely to have effects that are

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[40] "[T]he vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Indeed, the single largest factor in wrongful convictions is eyewitness error. Wells, *What Do We Know About Eyewitness Identification?*, 48 Amer. Psychologist 553 (1993). Huff, Rattner, and Sagarin, *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Delinq. 518, 524 (1986). *See generally*, Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987).

resistant to subsequent influence." Loftus and Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. Applied Psychol. ___ (1994) (in press). Smallwood testified that the police told him he had picked out the person who had been arrested, and, "he had killed somebody else." R vol I 19. Robert Territo's choice was similarly confirmed; after he selected Kyles's photograph, the police told him "that's the one." R vol I 36.

Thus, the witnesses' subsequent in-court identification of Kyles instead of Beanie is far from persuasive, especially in light of the fact that the witnesses had seen Kyles four or five times in court after the photographic lineup, and the police had instantly reinforced their original selection by telling them they had chosen correctly.[41]

The witnesses selected the "next best" face from a group of photographs that did not include Beanie. Their choice was "approved" by authority: they then committed to that choice. The image of the picture, seen, at leisure, for some minutes, replaced the image of a murderer viewed for a few seconds when the witness was under the worst sort of stress. Every time the witnesses came to court they saw Kyles and became more committed to their "identification" of him.

B. The Prosecution's Use Of False Evidence Was Not Harmless Beyond A Reasonable Doubt

In *Agurs*, the Court restated the by-then well-established rule of *Mooney* and *Napue* that a conviction obtained by the introduction of evidence that the prosecution knows or should know to be false "must be set aside if there is any reasonable likelihood that the false evidence could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103. In *Bagley*, the Court reaffirmed this

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[41] Asked, "Are you absolutely sure this is the individual?" Henry Williams replied "With all I know, I'm sure." Tr 58.

standard and stated that the *Agurs* language is "a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." *Bagley*, 473 U.S. at 679.[42]

There is a reasonable likelihood that the state's presentation of evidence known to be false and evidence which created a false impression affected the jury's judgment in this case.

1. False Testimony In Pretrial Hearings

It was Beanie who first suggested that the police search Kyles's garbage for evidence. On tape, Det. Eaton quotes Beanie as saying "He said [Kyles's] garbage goes out tomorrow said if he's smart he'll put it in the garbage." JA 257. Both Miller and Eaton confirmed that it was indeed Beanie who first suggested that the garbage be checked. H 2/24 21; H 3/3 64.

Trial counsel thought to investigate the possibility that Beanie was behind the evidence found in the garbage. As the state acknowledged in postconviction proceedings, this was the first time to their knowledge that a suspect's garbage had ever been searched for evidence. H 2/24 21. At a pretrial suppression hearing, defense counsel explicitly asked if the police had a tip from an informant to search the garbage, and the officer said "No." R vol II 47.

During the suppression hearing, counsel cross-examined Det. Dillman about whether there were any inconsistencies in the witnesses' original statements, how many physical descriptions were given, how they differed, if there were any discrepancies in age or facial hair or the clothing worn, or any other descriptive variance. Dillman replied that there were only three physical descriptions,

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[42] *Accord Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (CA5 1993) (this standard is "considerably less onerous" than the *Bagley* test for suppressed evidence).

varying in height only, a matter of 3 or 4 inches; that the difference in estimated ages ran from twenty to twenty-eight, and that there was no disagreement about facial hair, clothing, or anything else. R vol II 7-8.

Not a single response of Dillman's was accurate. The state had six, not three descriptions; height was not the only discrepancy, and height ranged from 5'4" to 6', a difference of 8, not 3 or 4 inches. Smallwood said the man he saw was a teenager and had a moustache. There were also discrepancies about clothing. The fact that these deceptions occurred pretrial in no way diminishes the harm done the defense. The jury was entitled to know about the discrepant witness statements and who first suggested "Look in the garbage." The jury was entitled to the true answers to questions which were not asked because counsel was deceived before trial began. *United States v. Spagnoulo*, 960 F.2d 990, 995 (CA11 1992) (noting the importance of *Brady* disclosures for pretrial preparation); *accord Scurr v. Niccum*, 620 F.2d 186, 191 n.3 (CA8 1980).

2. Smallwood's False Testimony

When Isaac Smallwood took the stand, the prosecution was well-aware of his prior statement given at the scene of the murder. JA 188, 269. Yet the prosecution said absolutely nothing when his testimony began to differ greatly from his statement. R vol II 41-5. In fact, the prosecution elicited the false statements.

Most importantly, Smallwood testified that he saw the shooting, when the state knew that he had said precisely the opposite earlier. He changed his story, and the state helped him do it. The prosecutor asked Smallwood at trial, "And did you see him actually shoot her?" and Smallwood answered "Yeah." Tr 42.

Both prosecutors admitted they had read the witness statements before trial. H 2/20 122; H 3/1 7, 12, 16. Both prosecutors permitted Smallwood to testify falsely: they even recalled him in rebuttal to do it again. Tr 387.

3. The False Dispute About The Sunday Dinner

Det. Dillman testified that he "ha[d] no idea if" Beanie was at Kyles's house on Sunday night. Tr 93. This testimony, probably false,[43] came from the only police officer called to the stand who had anything to do with the investigation. Tr 62. The clear impression conveyed was that Beanie was nowhere near Kyles's residence on Sunday night, and thus not in a position to plant the murder weapon found there the next day.

Strider's notes of his between-trials interview with Beanie record the fact that they discussed Beanie's movements that Sunday in great detail. Strider noted that Beanie first went to the Kyles residence about 2:00 pm, left and came back about 7:00, and that he went from that residence to the police, "riding around" with Det. Miller. JA 262. The state should not have permitted the jury to infer that Beanie was not at Kyles's apartment the night before the search, knowing that inference was absolutely false.

4. The State Knew Beanie Was Paid $600

Dillman lied when he testified that Beanie was paid $400 by the police for his alleged purchase of the car. Tr 94. Dillman admitted to the prevarication in the postconviction hearing, stating that Beanie was paid $600.[44] H 2/24 19-20.

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[43] Beanie was primarily Det. Miller's informant; Miller testified he turned over his information on Beanie to Dillman, the Dye homicide investigator. H 2/24 2. Miller encouraged Beanie to see if he could get more evidence, JA 238, 242, 245, and Beanie met with Miller at 10:00 pm on Sunday night just after leaving Kyles's house. Beanie told him where he had been. H 2/24 31-32.

[44] Beanie also received $1000 from Crimestoppers. H 2/20 113; H 2/24 20. Considering that one witness testified that Beanie offered to sell him the car for $200, Beanie's pecuniary

This point was significant. At trial, the state maintained that Beanie received $400 from the police because, as a good faith purchaser, he should not have to suffer the loss of buying a stolen car. Tr 94. The defense theory that Beanie was a regularly paid informant who pointed the finger at Kyles in part for a profit could hardly be exploited with this false testimony. The defense, and more importantly, the fact finders were duped.

5. The False Evidence About The License Plate

Dillman also testified that he "ha[d] no knowledge of" Beanie changing the license plate on the Dye vehicle. R vol II 95. But Det. Miller certainly knew that Beanie was the one who changed the plate. JA 231, 239. And prosecutor Strider knew that Beanie changed the plate, because they discussed it in an interview only days before the second trial. JA 261. This information, which the jury was entitled to have, was important for two reasons. One, it seriously weakened the state's assertion that Beanie was an innocent buyer. Two, it corroborated Burnes's testimony that he saw Beanie take the plate from an old car "by the tracks," because the plate in fact was from a stolen car. Tr 260; JA 241.

The crucial importance of the facts that Beanie visited Kyles's residence, changed the plates, and was paid $600 for information (not $400 for an alleged loss), is that these facts support the defense theory. The defense witnesses offered testimony in an effort to show that Beanie planted the gun and the purse, and that he stole the car.[45] Prosecutor Strider sat silent while testimony that suggested the contrary and that Strider knew to be false went to the

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dealings with the police must have been highly satisfying. Tr 234.

[45] Corroboration of a witnesses' testimony can be critical to either party's case. Here it was crucial given the fact that two key witnesses were scared to death as a result of the prosecution's threats and appeared incredible. *See, infra* at II B.

finders of fact in a capital trial. There is a reasonable likelihood that the jury's judgment was affected by the false and misleading evidence. It is not possible to find otherwise on this record.

C. Kyles's Sentence Of Death Is Unreliable

In Louisiana, if one juror determines that a life sentence is appropriate, the death sentence cannot be rendered.[46] "[T]he proper frame of reference," therefore, "is whether the mind of one juror could have been changed." *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (CA5 1993).

After the trial court instructed the jury, the foreperson, apparently concerned about Kyles's possible release from prison, asked, "I know that the law says life without benefit of parole, probation or suspension of sentence. Can you tell me if that's exactly carried out?" R unnumbered vol, 12/8/84 penalty phase instructions at 5.[47]

The jury sentenced Kyles to death after finding that the murder was committed in the course of an armed robbery. R vol I 53. Kyles presented witnesses to show that he was a loving father who supported and cared for his children, he had close family relationships with his mother and siblings, and he lacked a significant criminal

[46] La.C.Cr.P. art. 905.6, *see, e.g., State v. Loyd*, 459 So.2d 498 (La. 1984).

[47] The court responded by stating, "You should not in any way ponder, deliberate, consider what possible ramifications, if any there are in connection with my imposing [either] sentence. . . . The law says that that is the only response I can give you." *Id.*

history.[48] Kyles took the stand and continued to maintain his innocence.

The Louisiana Supreme Court has held that it is appropriate for the capital sentencing jury and a reviewing court to consider the question of residual or lingering doubt. In *State v. Lee*, 524 So.2d 1176 (La. 1987) (on rehearing), the court held that the introduction of an inadmissible confession was harmful error in the sentencing phase. The court reasoned that because "one or more jurors might have retained minor trepidations about the nature" of the state's evidence, that "uncertainty, though not rising to the level of reasonable doubt regarding guilt, might have led such a juror to hold out for a life sentence." *Id.* at 1192. *See State v. Messiah*, 538 So.2d 175 (La. 1988) (it is appropriate for counsel to argue residual doubt regarding specific intent); *State ex rel. Burnham v. Blackburn*, 484 So.2d 656 (La. 1986) (even though a rational fact finder could have found that the murder was committed in the course of an armed robbery, the jury's verdict of life may have been the result of lingering doubts about whether armed robbery was committed).

States are free to permit capital sentencers to consider residual doubt. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). While *Franklin* held that a residual doubt instruction is not constitutionally mandated, the Court recognized that "residual doubts will inure to the defendant's benefit," *id.* at 173, and noted that Franklin's jury was free to consider them. *Id.* at 174, 175.

The majority below failed to consider the impact that residual doubt has in this case. This was error. The evidence suppressed by the state casts doubt on Kyles's identity as the murderer. In a capital case, the "petitioner should receive the benefit of the doubt" on the question

[48] The prosecution agreed that petitioner met the statutory mitigating circumstance found in La.C.Cr.P. art. 905.5(a) by stating in closing argument, "there's only one mitigating circumstance. . . . a lack of prior criminal activity." Tr unnumbered vol, 12/8/84 at 10.

of materiality. *Lindsey v. King*, 769 F.2d 1034, 1043 (CA5 1985). Louisiana law views residual doubt as a relevant issue for the jury's consideration in capital sentencing and a factor that must be considered by reviewing courts when assessing error. Given the effect of the withheld and false evidence in the guilt or innocence phase, it is probable that, one or more jurors, unswayed by these constitutional improprieties, would have harbored a doubt about guilt that would have inured to Kyles' benefit at sentencing. Such doubt undermines confidence in the reliability of the death sentence. *Bagley*, 473 U.S. at 683.

II. THE MAJORITY BELOW ERRED IN ITS ANALYSIS

A. The Majority's Analysis Of The Significance Of The Prosecution's Undisclosed Information Is Faulty

The majority opinion below errs by significantly understating the effect that the undisclosed evidence would have had on a reasonable juror, by substantially misunderstanding how a competent defense lawyer would have used the evidence, by significantly overestimating the impact of the state's case on a reasonable juror, and by failing to analyze how the suppressed evidence impacts on the death sentence. Moreover, the majority wholly fails to consider the prosecution's introduction of false evidence. The opinion mischaracterizes this case as one in which Kyles is "essentially ask[ing] th[e] court to reconsider the defensive theory rejected by the jury." *Kyles*, 5 F.3d at 807. Exactly the opposite is true: petitioner is asking the Court to give him a chance to convince a jury of his innocence on the basis of a wealth of previously misrepresented and suppressed evidence that was not before his original trier of fact.

The majority fails to consider the cumulative effect of the withheld information; the court views each suppressed item as separate and apart from each other. This

is wrong as a matter of law. "Certainly, the effect of each nondisclosure . . . might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial." *United States ex rel. Marzeno v. Gengler*, 574 F.2d 730, 736-37 (CA3 1978); *accord Chaney v. Brown*, 730 F.2d 1334, 1356 (CA10 1984) (all items of withheld evidence "must be viewed together for their cumulative effect"); *King v. Ponte*, 717 F.2d 635, 642 (CA1 1983) (court must "consider the cumulative effect of these suppressions rather than the effect of each statement on its own").

Each suppressed item has value to Kyles and each value is qualitatively different. The value of certain information is readily apparent, such as the fact that Beanie's suggestion prompted the New Orleans police to seize abandoned garbage for the first time. The value of Beanie's being arrested for theft three months prior to the murder is not so apparent; its significance increases when the site of the theft is identified as Schwegmann and when the incident is viewed in the light of all other information now known about Beanie. The majority below fails to assess how the defense could have used such information to demonstrate that the police investigation and its products were skewed by the unquestioned acceptance of Beanie's stories. It is only when all the suppressed facts are analyzed cumulatively that a proper analysis can be made. *See Kyles*, 5 F.3d at 831 (King, J., dissenting).

The majority's assessment that the evidence against Kyles was overwhelming is erroneous, in part because the court fails to make this assessment in light of the defense evidence. It is plainly wrong in "attach[ing] little significance" to the fact that the jury could not agree on a verdict at the first trial. *Id.* at 817 n.16.[49] A prior mistrial

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[49] The suggestion that the possibility that a "juror's concern about capital punishment" may have caused the mistrial ignores the obvious and is contrary to law. *Id.* 817 n.16. The jury

based upon a hung jury is an important consideration regarding *Brady* materiality. *Stano v. Dugger*, 901 F.2d 898 (CA11 1990) (en banc). Where, as here, the evidence against a defendant in a second trial is essentially the same as in the first, the "verdict is already of questionable validity, [thus] additional evidence of minor importance" justifies a new trial. *Agurs*, 427 U.S. at 113.

B. Other Prosecutorial Misconduct Should Have Been Included In Assessing Materiality

In assessing the materiality of the suppressed evidence, the Fifth Circuit majority also fails to take account of other egregious prosecutorial misconduct. Shortly before defense witnesses Burnes and Black were called to the stand, the prosecution told the court that it was "considering the possibility" of filing charges against them relating to the Dye murder, and requested the court to advise them of their rights under the Fifth Amendment. Tr 195. Prosecutor Strider had also threatened Burnes with prosecution outside the courtroom. H 2/24 41. Both witnesses agreed to testify after being instructed.[50] This "possibility" of prosecution was never mentioned at the first trial although both testified. H 3/1 39.

Unbeknownst to the court and defense at trial, there never really was a "possibility." The prosecutors' threats were a sham. At the postconviction hearing, in response to a direct question whether either prosecutor or the state

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was deliberating on guilt not punishment; a juror with concerns about the death penalty would have debated them at the proper time. Courts are to assume that juror's abide by the instructions. *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

[50] The threats continued during the testimony of Black, when, after the witness answered "no" to a series of "Isn't it true . . ." questions on cross-examination, Strider asked, "Sir, could I remind you that there's a law in this state and it's called perjury." Tr 217.

had any reason to believe that the witnesses were in any way involved with the murder, prosecutor Williams responded, "No." H 3/1 18.

These threats were "unconscionable"[51] and were calculated to rattle the witnesses into a state of fear and intimidation to the point that the witnesses "were a mere shadow of their original selves." H 2/20 33. Trial counsel testified that at the first trial the witnesses appeared "confident," "honest," "articulate," and "comfortable." *Id*. After the threats, the defendant's "most critical witnesses . . . were visibly shaken. . . . [and] appeared to be scared to death." *Id*. at 33-4.[52] In rebuttal closing argument, the prosecutor attacked Black's credibility and pointed out how "strange" his demeanor was: "I couldn't get him to look at me." Tr unnumbered vol 12/8/84 56.

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[51] *State v. Kyles*, 513 So.2d 265, 277 (La. 1987) (Dennis, J., concurring). On direct appeal, the court found no error in the trial court's instruction. *Id*. at 272. This ruling was made without the benefit of evidence noting the effect of the threats.

[52] Even if the threats do not prevent the witness from testifying, "[t]here is an obvious and considerable difference between the free and open testimony anticipated of a voluntary witness and the perhaps guarded testimony of a reluctant witness . . . " *United States v. Thomas*, 488 F.2d 334, 336 (6th Cir. 1973). *See also United States v. Saunders*, 943 F.2d 388 (CA4 1991); *United States v. Morrison*, 535 F.2d 223, 227-28 (CA3 1976).

CONCLUSION

For the above reasons, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

La. Code Crim. Proc. Art. 905.2 Sentencing hearing; procedure and evidence

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

La. Rev. Stat. 14:30 First Degree Murder

First degree murder is the killing of a human being:

(1) when the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(2) when the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

(3) when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(4) when the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

For the purposes of Paragraph (2) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury.

APPENDIX B

D-1	Articles on Eyewitness Identification H 2/20/89, 7, 8
D-2	Memo On French Quarter Accident H 2/20/89, 40, 41
D-3	Beanie's Written Statement 9/20/84 H 2/20/89, 42, 43, 44
D-4	Transcript Of Beanie's Taped Conversation With Police H 2/20/89, 47
D-5	Tape Of Conversation H 2/20/89, 65
D-6	Beanie's Rap Sheet H 2/20/89, 97, 98
D-7	Memo On Recording License Plates, And Print Out Of Plates H 2/20/89, 136, 137; H 2/24/89, 55
D-8	Strider's Notes Of Interview With Beanie H 2/20/89, 141, 143
D-9	Beanie's 12/12/84 Written Statement (Leidenheimer) H 2/20/89, 144 (Also included in D-12)
D-10	Smallwood's Statement H 2/24/89, 69
D-11	District Attorney's File on Suazo H 3/1/89, 22, 23
D-12	Leidenheimer – New Orleans Police Homicide File H 3/1/89, 23, 24
D-13	Burnes' Statement (Leidenheimer) H 3/1/89, 44
D-14	Affidavit Of Juror Sidney Bailey H 3/3/89, 10, 11 Proffered only
D-15	District Attorney's Screening File On Dye H 3/3/89 17 Proffered only at H 4/7/89, 12

D-16 District Attorney's File On Dye H 3/3/89, 26, 27

D-17 Memo On Garbage Pick-up H 3/3/89, 62, 63

D-18 Murphy's Notes H 4/7/89, 6

D-19 8 Photos, In Globo H 4/7/89, 6, 7

D-19(a) Photograph H 4/7/89, 6, 7

D-19(b) Photograph H 4/7/89, 6, 11, 7

D-19(c) Photograph H 4/7/89, 6, 7

D-20 Murphy Affidavit H 4/7/89, 7, 8 Proffered at H 4/7/89, 12

D-21 Martina (Pinky) Burnes' Affidavit H 4/7/89, 25, 41-42 (not offered, only appears) H 4/7/89, 51, 55

D-22 Stipulation about Crimestoppers H 4/25/89, 2, 3

D-22(a) Receipt Of $1000.00 On Crimestoppers H 4/25/89, 3

D-23 Letter Of Joe Warnke H 5/12/89, 2, 16, 17

D-23(a) Letter Of Joe Warnke H 5/12/89, 2, 16, 17

APPENDIX C

WITNESS	RACE/COMPLEXION	HAIR	AGE	HEIGHT	WEIGHT/ BUILD	CLOTHING
SMALLWOOD	black/dark	braided hair, length to shoulders; had a light mustache	17 or 18			
TERRITO	black/dark	wooly and in platts	28	close to 6 ft	slim	blue jeans and plaid shirt
H. WILLIAMS	black/dark	platted hair; short	19-20	5'4"-5"	140-150/ medium	jeans; pull-over shirt, short-sleeved, possibly w/ black designs
JONES	black/dark	platted	17-18	5'9"	140	blue jeans; short-sleeved dark shirt with little white dots
PLICK	black/"chocolate"		in 20's	5'10"	slender	dark shirt
E. WILLIAMS	black/dark	black				blue jeans, black shirt